

Rule 3, Ariz. R. Crim. P.

***Terry* stop: Scope of frisk or “pat down” during *Terry* stop.....Revised 2/2010**

An officer may frisk or “pat down” a suspect for a weapon during a stop under *Terry v. Ohio*, 392 U.S. 1, 24 (1968), to protect the officer’s safety. The officer may pat down the suspect when the officer “is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.” *Id.* The sole purpose of the pat-down during a *Terry* stop is “to determine whether the person is in fact carrying a weapon.” *Id.* As stated by the Court in *Terry*:

The sole justification of the search ... is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Terry, 392 U.S. at 29.

The purpose of the limited search allowed during a *Terry* stop “is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.” *Adams v. Williams*, 407 U.S. 143, 146 (1972); *State v. Valle*, 196 Ariz. 324, 327, ¶ 9, 996 P.2d 125, 128 (App. 2000); accord *In re Tiffany O.*, 217 Ariz. 370, 373, ¶ 8, 174 P.3d 282, 285 (App. 2007). “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” *Sibron v. New York*, 392 U.S. 40, 65-66, 88 S.Ct. 1889, 1904 (1968). Therefore, if an officer feels something during a *Terry* stop and pat-down search that is concealed on a person, but that is clearly not a weapon and not obviously contraband,

the officer cannot pursue the search further. *Valle*, 196 Ariz. st 327, ¶ 9, 996 P.2d at 128.

However, if an officer conducting a legitimate *Terry* search discovers something other than a weapon that is nevertheless obviously contraband, “he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.” *Michigan v. Long*, 463 U.S. 1032, 1050 (1983). “If a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.” *Minnesota v. Dickerson*, 508 U.S. 366, 375-376 (1993). “Contraband may be seized if, during a lawful frisk, the officer feels an object he knows is contraband without the need to manipulate it.” *State v. Watkins*, 207 Ariz. 562, 568, ¶ 26, 88 P.3d 1174, 1180 (App. 2004) *quoting Valle*, 196 Ariz. at 327, ¶ 10, 996 P.2d at 128. In *Watkins*, an officer patted down the suspect in a valid *Terry* stop, felt a plastic baggie, and was poked by marijuana stems. The Court of Appeals held that because the officer immediately recognized the item as contraband, he had probable cause to seize the marijuana. Thus, the officer’s seizure of the marijuana was lawful.

This has been called the “plain feel” doctrine, in an analogy to the “plain view” doctrine. The Arizona Supreme Court explained in *Mazen v. Seidel*, 189 Ariz. 195, 940 P.2d 923 (1997), that if an officer is lawfully in a position to observe contraband by the exercise of any of his senses, the officer may seize the contraband without a warrant:

Once entrance into a private space is determined to be lawful, contraband that is in plain view, or even “plain smell,” may be lawfully seized. See *Horton v. California*, 496 U.S. 128, 136, 110 S.Ct. 2301, 2307-08, 110 L.Ed.2d 112 (1990). However, according to our court of appeals, “the discovery of the object must be inadvertent; and its evidentiary value must be immediately apparent to the officer.” *State v. Kelly*, 130 Ariz. 375, 378, 636 P.2d 153, 156 (App. 1981); cf. WAYNE R. LAFAYE, SEARCH AND SEIZURE § 6.7 (1978). If the officer was lawfully in the place where he saw the contraband, this court has stated that there was no real search; thus “it cannot be unreasonable or unconstitutional to seize the item in plain view.” *State v. Cobb*, 115 Ariz. 484, 488, 566 P.2d 285, 289 (1977).

Mazen v. Seidel, 189 Ariz. at 197, 940 P.2d at 925.

In *Valle*, after a valid traffic stop, an officer patted suspect Valle down for officer safety purposes. He felt “an object” in Valle’s pants pocket. 196 Ariz. at 326, ¶ 4, 996 P.2d at 127. Although the object did not feel like a weapon and the officer could not identify it as contraband, the officer reached into Valle’s pocket and removed the object, which turned out to be a package of cigarette rolling papers. The officer then told Valle to remove his shoes and, when he did, the officer found a bag of marijuana in one of the shoes. *Id.* The Court of Appeals held that both the marijuana and paraphernalia should have been suppressed. The officer could not identify the item in Valle’s pocket as contraband during the pat-down search and only discovered that it was contraband after he removed it from Valle’s pocket. Thus, the search of Valle’s pocket was not justified under the “plain feel” doctrine. *Id.* at 327, ¶ 10, 996 P.2d at 128. Further, the Court stated that the officer exceeded the scope of the *Terry* search by having Valle remove his shoes, noting that the officer did not attempt to pat down the shoes or otherwise determine if they contained a weapon. *Id.* at 330, ¶ 18, 996 P.2d at 131. The Court stressed, however, that under other circumstances, an officer could “have a reasonable and articulable suspicion that a suspect is carrying a weapon in his or her shoe and that

that weapon is sufficiently accessible to the suspect to present a possible danger to the officer or others.” *Id.*